

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PUBLIC EMPLOYEES FOR
ENVIRONMENTAL RESPONSIBILITY,
962 Wayne Ave, Suite 610
Silver Spring, MD 20910

Plaintiff,

v.

DEPARTMENT OF THE INTERIOR
1839 C Street, N.W.
Washington, DC 20240

Defendant

CIVIL ACTION NO. 19-2080

COMPLAINT

PRELIMINARY STATEMENT

1. Plaintiff Public Employees for Environmental Responsibility (“Plaintiff” or “PEER”) brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, as amended, to compel the United States Department of the Interior (“Defendant,” “Interior,” or “DOI”) to disclose documents requested pursuant to FOIA.
2. Plaintiff is a non-profit organization dedicated to research, public education, and advocacy concerning the activities and operations of federal, state, and local governments.
3. In April 2019, Plaintiff sent two FOIA requests to Defendant’s bureaus. The first request, filed April 4, concerned any exercising of any function or duty of the Director of Interior’s U.S. Fish and Wildlife Service (USFWS) as prescribed in the Endangered Species Act, Migratory Bird Treaty Act, Wild Bird Conservation Act, or Marine Mammal Protection Act, including but not limited to any function or duty provided for in the USFWS regulations that implement those

four Acts in Title 50, Code of Federal Regulations, Chapter I, subchapters A-H, conducted by Margaret Everson, the Principal Deputy Director of the USFWS.

4. The second request, filed April 5, 2019, concerned any exercising of any function or duty of the Director of Interior's Bureau of Land Management (BLM) as prescribed in Title 43 U.S. Code of Federal Regulations, Subtitle B, Chapter II, or in the Federal Land Policy and Management Act (FLPMA), conducted by Brian Steed, BLM's Deputy Director for Policy and Programs.
5. Defendant has failed to provide more than *pro forma* replies to Plaintiff's FOIA requests and has produced no responsive records.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action under 5 U.S.C. § 552(a)(4)(B). This Court also has federal question jurisdiction over this action under 28 U.S.C. § 1331.
7. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*
8. This Court is a proper venue under 5 U.S.C. § 552(a)(4)(B) (providing for venue in FOIA cases where the plaintiff resides, or in the District of Columbia).
9. This Court has the authority to award reasonable costs and attorneys' fees under 5 U.S.C. § 552(a)(4)(E).

PARTIES

10. Plaintiff, PEER, is a non-profit public interest organization incorporated in Washington, D.C. and headquartered in Silver Spring, Maryland, with field offices in California, Colorado, Florida, Massachusetts, and Tennessee.

11. Among other public interest projects, PEER engages in advocacy, research, education, and litigation relating to the promotion of public understanding and debate concerning key current public policy issues. PEER focuses on the environment, including the regulation and remediation of toxic substances, public lands and natural resource management, public funding of environmental and natural resource agencies, and governmental accountability. PEER educates and informs the public through news releases to the media, through its web site, www.peer.org, and through publication of the *PEER Review* newsletter.
12. Defendant, DOI, is an agency of the United States as an “executive department” under 5 U.S.C. § 552(f)(1). It includes, among its several bureaus, the USFWS and the BLM.
13. Defendant is charged with the duty to provide public access to records in its possession consistent with the requirements of the FOIA. The Defendant’s refusal to provide the Plaintiff with the records requested is a violation of the FOIA, a federal law.

STATEMENT OF FACTS

14. Article II, Section 2, of the U.S. Constitution mandates (emphasis added):
 - a. [The President] ... *by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.*
15. President Trump has avoided this mandate for more than two years and instead DOI has filled its lead officer positions with lower-level political appointees who have circumvented Senate advice and consent. The appointments at issue have also failed to meet the requirements for installing an officer in an “acting” capacity under the Federal Vacancies Reform Act (5 U.S.C. § 3345 *et seq.*). They have included, among others, lower-level appointees serving in the roles of the Directors of the USFWS (Margaret Everson) and of the BLM (Brian Steed).

PEER's First FOIA Request

16. On April 4, 2019, Plaintiff requested information concerning actions by Margaret Everson, the

Principal Deputy Director of the USFWS. Specifically, PEER requested the following:

- a. Copies of any and all documents dated since Jan. 1, 2019, indicating that Margaret Everson, the Principal Deputy Director of the U.S. Fish and Wildlife Service (USFWS), has exercised any function or duty designated to be exercised by the Director of the USFWS under the Endangered Species Act, Migratory Bird Treaty Act, Wild Bird Conservation Act or Marine Mammal Protection Act, including, but not limited to, any such function or duty provided for in the USFWS regulations that implement those four Acts in Title 50, Code of Federal Regulations, Chapter I, subchapters A-H.*

17. Plaintiff also requested that to the extent that DOI needed to perform a detailed review, fees be waived because “disclosure of the information is in the public interest . . . and is not primarily in the commercial interest of the requestor.” 5 U.S.C. 552 (a)(4)(A).

18. On April 9, 2019, the USFWS FOIA office informed Plaintiff by email that it had received Plaintiff's FOIA request, that it would take a 10-day extension for its response pursuant to 43 C.F.R. § 2.19,¹ and it put the request under the complex processing track, which the agency uses to designate requests that “will take between twenty-one workdays and sixty workdays to process.” 43 C.F.R. § 2.15(c)(3). The USFWS FOIA office assigned the tracking number FWS-2019-00622 and gave June 27, 2019 as the expected response date.

19. On July 1, 2019, Plaintiff requested a response to its FOIA request.

20. On July 8, 2019, the USFWS FOIA office responded that it would not complete Plaintiff's FOIA request within its expected response date. At the time of filing, the USFWS FOIA office has not provided any responsive documents or given an estimated date by which it would.

¹ 43 C.F.R. 2.19 permits the agency to “extend the basic time limit[] if unusual circumstances exist.”

PEER's Second FOIA Request

21. On April 5, 2019, Plaintiff requested information concerning actions by Brian Steed, the Deputy Director for Policy and Programs at the BLM. Specifically, Plaintiff requested the following:

- a. *Copies of any and all documents dated since Jan. 1, 2019, indicating that Brian Steed, Deputy Director for Policy and Programs, Bureau of Land Management (BLM), has exercised: (a) any function or duty designated to be exercised by the Director of the BLM under the Federal Land Policy and Management Act (FLPMA), and (b) any function or duty designated to be exercised by the Director of the BLM in the BLM regulations in Title 43, Code of Federal Regulations, Subtitle B, Chapter II.*

22. Plaintiff also requested that to the extent that the DOI needed to perform a detailed review, fees be waived because “disclosure of the information is in the public interest . . . and is not primarily in the commercial interest of the requestor.” 5 U.S.C. 552 (a)(4)(A).

23. On May 13, 2019, the BLM FOIA office confirmed receipt of Plaintiff's FOIA request by email, assigned it control number FOIA-2019-00715, and put the request under the complex processing track, which the agency uses to designate requests that “will take between twenty-one workdays and sixty workdays to process.” 43 C.F.R. § 2.15(c)(3). The BLM FOIA office did not provide an estimated date for its response beyond the 21 to 60 working day timeline, putting the expected response date at June 28, 2019.

24. On July 1, 2019, Plaintiff requested a response to its FOIA request.

25. On July 3, 2019, the BLM FOIA office replied, indicating it desired 30 to 60 additional business days to respond to the request. At the time of filing the BLM FOIA office has not provided any responsive documents or committed to a date by which it would.

CAUSE OF ACTION: FREEDOM OF INFORMATION

26. Plaintiff restates and realleges the allegations in the preceding paragraphs as if fully set forth herein.
27. The FOIA requires federal agencies to respond to public requests for records, including files maintained electronically, to increase public understanding of the workings of government and to provide access to government information. The FOIA reflects a “profound national commitment to ensuring an open Government” and agencies must “adopt a presumption in favor of disclosure.” Presidential Mem., 74 Fed. Reg. 4683 (Jan. 21, 2009).
28. The FOIA requires agencies to determine within 20 working days after the receipt of any FOIA request whether to comply with the request. 5 U.S.C. § 552(a)(6)(A)(i). Agencies may only extend this time period for an additional 10 working days in “unusual circumstances.” 5 U.S.C. § 552(a)(6)(B)(i); see also 43 C.F.R. § 2.19 (DOI FOIA regulations specifying circumstances in which the agency may extend its deadline to reply). The FOIA also provides that upon request, agencies are to make records “promptly available.” 5 U.S.C. § 552(a)(3)(A).

First Count: Request FWS-2019-00622

29. Plaintiff restates and realleges the allegations in the preceding paragraphs as if fully set forth herein.
30. PEER’s first FOIA request was received by USFWS FOIA office on April 4, 2019. A response to PEER’s FOIA request was due by statute thirty working days from that date—because USFWS took the 10-day extension—on May 16, 2019 (counting all weekdays).
31. As of this filing, Plaintiff has not received any documents responsive to its FOIA request or any communications from Defendant regarding this request other than those described herein.

32. Administrative remedies are deemed exhausted when an agency fails to comply with the applicable time limits. 5 U.S.C. § 552(a)(6)(C)(i). Having fully exhausted its administrative remedies for its FOIA request, Plaintiff now turns to this Court to enforce the remedies and public access to agency records guaranteed by the FOIA.
33. Defendant's conduct amounts to a denial of the Plaintiff's FOIA request. Defendant is frustrating Plaintiff's efforts to adequately understand and educate the public regarding improper actions taken by Margaret Everson, and how the USFWS is run by officers requiring Senate confirmation whom have not received it.
34. Plaintiff has constructively exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C)(i), and now seeks an order from this Court requiring the Defendant to immediately produce the records sought in Plaintiff's FOIA request, as well as other appropriate relief, including attorneys' fees and costs.
35. Defendant's failure to make a determination on or disclose the documents requested in Plaintiff's FOIA request within the time frame mandated under FOIA is a denial and wrongful withholding of records in violation of 5 U.S.C. § 552.

Second Count: Request FOIA-2019-00715

36. Plaintiff restates and realleges the allegations in the preceding paragraphs as if fully set forth herein.
37. PEER's second FOIA request was received by BLM on April 5, 2019. A response to PEER's FOIA request was due by statute twenty working days from that date on May 3, 2019 (counting all weekdays).

38. As of this filing, Plaintiff has not received any documents responsive to its FOIA request, or any communications from Defendant regarding this request other than those described herein.

39. Administrative remedies are deemed exhausted when an agency fails to comply with the applicable time limits. 5 U.S.C. § 552(a)(6)(C)(i). Having fully exhausted its administrative remedies for its FOIA request, PEER now turns to this Court to enforce the remedies and public access to agency records guaranteed by the FOIA.

40. Defendant's conduct amounts to a denial of the Plaintiff's FOIA request. Defendant is frustrating Plaintiff's efforts to adequately understand and educate the public regarding improper actions taken by Brian Steed, and how BLM is run by officers requiring Senate confirmation whom have not received it.

41. Plaintiff has constructively exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C)(i), and now seeks an order from this Court requiring the Defendant to immediately produce the records sought in Plaintiff's FOIA request, as well as other appropriate relief, including attorneys' fees and costs.

42. Defendant's failure to make a determination on or disclose the documents requested in Plaintiff's FOIA request within the time frame mandated under FOIA is a denial and wrongful withholding of records in violation of 5 U.S.C. § 552.

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that this Court:

- i. Enter an order declaring that Defendant wrongfully withheld the requested agency documents;

- ii. Issue a permanent injunction directing Defendant to disclose to Plaintiff all wrongfully withheld documents;
- iii. Maintain jurisdiction over this action until Defendant is in compliance with the FOIA, the Administrative Procedure Act, and every order of this Court;
- iv. Award Plaintiff attorney fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E); and
- v. Grant such additional and further relief to which Plaintiff may be entitled.

Respectfully submitted on June 12, 2019,

/s/ Peter Jenkins
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